Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

JOHN H. FORD, III,
Petitioner,

v.

SHAUN FRAME; CITY OF COLUMBUS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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50 pp
$5/p

QUESTIONS PRESENTED FOR REVIEW

1.) Should an employer be allowed to assign an employee (who has been prescribed anti-depressants) to work with another employee (who has an on-going known disability) doing heavy plant maintenance on equipment and machinery?

2.) If an employer is allowed; who would be responsible if one of the employees would get injured or killed?

3.) Would an employer still be allowed, if the employees who were assigned to work with the employee on anti-depressants, had notified the employer that the employee was not safe to work with?

4.) A. What allows an employer to assign an employee (whom they feel is not safe) with another employee (who is known for having a disability)?

B. Would that be intentionally taking a chance that one of the employees could possibly be injured or killed?

LIST OF PARTIES

Petitioner

John H. Ford, III has no corporate affiliations.

Respondents

Shaun Frame; City of Columbus, Ohio

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The Opinion of the United States Court of Appeals for the Sixth Circuit, dated January 26, 2001 is located at Appendix A, p.1a. The Court of Appeals Order Denying Rehearing, dated March 7, 2001 is located at Appendix D, p.32a. The District Court Judgment, dated April 13, 2000 and the Memorandum and Order, dated April 12, 2000 are located at Appendix B, p.6a and Appendix C, p. 8a.

STATEMENT OF THE CASE

Due to the non-recognition of the Americans-With-Disabilities Act, I was denied a reasonable accommodation and placed with another civil service employee who was under the influence of anti-depressants. During this time I was assigned to install (100 to 150 lbs. each) steel tension rods inside a sediment basin inside a water plant. I was informed by my immediate supervisor, that management did not want the employee on anti-depressants to work on the two-man hydraulic lift, because he had almost walked off the end of the lift while it was still up in the air. This manifested the fact that management was completely aware of how unsafe the employee really was.

That employee was on the basin floor when he jerked the forty-two foot of tension rod, causing the rod to pull me over the handrail of the two-man lift. All I could see was concrete floor as I reached back with my right arm to keep my whole body from going completely over the handrail. I felt my stomach tear and my back pop as this was happening. I yelled down to the employee to stop him and to let him know my stomach was hurting as well as my back. I then lowered the two-man lift and slowly climbed down. At that time I unreasonably yelled at the employer for almost killing me.

That's when the immediate supervisor yelled down at me and I told him what happened. He asked ma if I wanted to go to the doctors and I told him no because it was 2:15 p.m. and that I just wasn't going to be able to do anything else but go sit down and take it easy until 3:30 p.m.

I went home that weekend hoping that if I laid around and rested, maybe I would start feeling better. As the weekend passed, I continued to feel worse.

Monday, I got up and hobbled in to work, where I immediately told my supervisor I needed to call my doctor to get in as quick as I could.

After going to my doctor and having the tests done that he ordered, I found out that I had a 2 ½ to 3 inch tear in my abdominal wall and a broken spine at L-3 and L-4 with a crushed disc.

This is why I am now permanently and totally disabled. I live in real pain every day of my life with this.

In conclusion, I feel that the court should uphold the A.D.A. act and grant me this appeal.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The main reason I am requesting the writ to be granted is because I do not feel that the City of Columbus has honestly submitted all of the evidence to allow for an honest ruling to be made. I have not been able to work at all since I was injured in the accident at work and I may not ever be able to work again. If the court does not realize the amount of hardships, pain and suffering this accident has put on me and my family, just because the City of Columbus makes their own rules up to deal with these types of situations, there really isn't anymore I can do to protect my rights than what I have done.

CONCLUSION

For the reasons cited in the brief, the Court of Appeals Decision should be reversed and judgment should be granted in favor of Petitioner, John H. Ford, III.

Respectfully Submitted,

John H. Ford, III

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed January 26, 2001]

No. 00-3679

JOHN H. FORD, III,
Plaintiff-Appellant,

v.

SHAUN FRAME; CITY OF COLUMBUS,
Defendants-Appellees.

Before: BOGGS and MOORE, Circuit Judges; COHN, District Judge.*

ORDER

John H. Ford, III, an Ohio resident proceeding pro se, appeals a district court order and judgment granting summary

*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

judgment to the defendants in his employment discrimination action brought under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, and § 504 of the Rehabilitation Act of 1973. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Ford, who has been employed by the City of Columbus's Division of Water, as a plant maintenance mechanic since November 1988, sued the city and his supervisor (Frame) for allegedly discriminating against him because of his handicap in violation of the ADA, the Rehabilitation Act, and Ohio Rev. Code Chapter 4112. In addition, he asserted that the defendants' actions constituted the state tort of intentional infliction of emotional distress. Ford alleged that the defendants refused to reasonably accommodate his physical handicap (herniated disc in his back, and torn cartilage in both knees) by permanently assigning him to the lighter preventive maintenance duties rather than requiring him to perform the full range of duties required as a plant maintenance mechanic. He sought compensatory damages, including back pay, front pay, benefits and prejudgment interest; and unspecified punitive damages. Ford exhausted his administrative remedies by initially filing a charge with the Equal Employment Opportunity Commission, which issued a right to sue letter on December 6, 1996.

The district court granted the defendants' motion for summary judgment in a memorandum and order filed on April 12 and entered on April 13, 2000. The district court found that Ford failed to establish a *prima facie* case of

handicap discrimination under either the ADA or the Rehabilitation Act because, *inter alia*, he has not shown that he is disabled within the meaning of those acts. The district court further found that Frame was entitled to summary judgment because there is no individual liability for handicap discrimination in employment. Finally, the district court dismissed Ford's state law claims without prejudice because his federal claims were dismissed prior to trial. A separate judgment was entered the same day.

On appeal, Ford continues to argue that he has established a *prima facie* case of disability discrimination under the ADA and the Rehabilitation Act.

Upon review, we affirm the district court's judgment for the reasons stated in its accompanying memorandum and order. This court reviews a grant of summary judgment *de novo*, using the same test as that used by the district court. *Gaines v. Runyon,* 107 F.3d 1171, 1174 (6th Cir. 1997). Thus, summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). "There is no issue for trial unless there is sufficient evidence in favor of the non-moving party for a jury to return a verdict for that party." *Gaines,* 107 F.3d at 1174.

Ford does not raise on appeal either the dismissal of his claim against his supervisor, Frame, or the dismissal without prejudice of his state law claims. Therefore, those issues are considered to be abandoned and are not reviewable. *See Enertech Elec., Inc. v. Mahoning County Comm'rs,* 85 F.3d 257, 259 (6th Cir. 1996). In any event, the district court properly dismissed those claims. This court has held that

individual supervisors who do not independently qualify under the statutory definition of employers may not be held personally liable in either ADA cases, *Sullivan v. River Valley School Dist.*, 197 F.3d 804, 808 n.1 (6th Cir. 1999), *cert. denied*, 120 S. Ct. 2718 (2000), or under the Rehabilitation Act. *Hiler v. Brown,* 177 F.3d 542, 546-47 (6th Cir. 1999). In addition, district courts possess broad discretion in determining whether to retain supplemental jurisdiction over state claims once all federal claims are dismissed. *Street v. Corrections Corp. of America,* 102 F.3d 810, 818 (6th Cir. 1996).

Moreover, the district court properly analyzed Ford's claims under the ADA and under § 504 of the Rehabilitation Act together. "By statute, the Americans with Disabilities Act standards apply in Rehabilitation Act cases alleging employment discrimination." *Burns v. City of Columbus,* 91 F.3d 836, 842 (6th Cir. 1996) (citing 29 U.S.C. § 794(d)).

In order to establish a *prima facie* case of handicap discrimination based on a failure to accommodate, a plaintiff must show that: (1) he is an individual with a disability within the meaning of the Act; (2) he is otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation; (3) his employer was aware of his disability; and (4) the employer failed to provide a reasonable and necessary accommodation for his disability. *See Smith v. Ameritech,* 129 F.3d 857, 866 (6th Cir. 1997) (ADA); *Gaines,* 107 F.3d at 1175 (Rehabilitation Act). "Once the plaintiff has presented a *prima facie* case, the burden shifts to the employer to demonstrate that the employee cannot reasonably be accommodated, because the accommodation would impose an undue hardship on the operation of its

programs." *Gaines,* 107 F.3d at 1175-76. "If the plaintiff fails to establish a *prima facie* case, it is unnecessary to address the question of reasonable accommodation." *Id.* at 1176.

Ford has failed to present a *prima facie* case of disability discrimination because he has failed to show that he is disabled within the meaning of the acts. "The ADA defines a disabled person as one who (1) has a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (2) has a record of such impairment, or (3) does not have an impairment, but is regarded as having one." *Sullivan,* 197 F.3d at 810. Working is one such major life activity. 29 C.F.R. § 1614.203(a)(3). It is undisputed that Ford suffers from back and knee problems, both of which have been treated.The issue is whether those problems rise to the level of a disability as defined. The district court did not err in holding, as a matter of law, that they do not.

Accordingly, the district court's judgment, entered on April 13, 2000, is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/_____
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

[Filed April 13, 2000]

No. C2-97-297

John Ford)
)
vs.)
)
Shaun Frame, et al)
)

Judge John D. Holschuh
Magistrate Judge Abel

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] **Decision by Court.** This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order of April 12, 2000, the defendants' motion for summary judgment is GRANTED. JUDGMENT is entered for defendants as to plaintiff's claims under the Americans with Disabilities Act and the Rehabilitation Act. Plaintiff's state law claims are DISMISSED without prejudice.

Date: April 13, 2000 **Kenneth J. Murphy, Clerk**

/s/_____
By Peg Lambert/Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

[Filed April 12, 2000]

No. C2-97-295

JOHN FORD,
Plaintiff,

v.

SHAUN FRAME, et al.,
Respondent.

Judge John D. Holschuh
Magistrate Judge Abel

MEMORANDUM AND ORDER

This is an employment discrimination case in which Plaintiff John Ford alleges that Defendants, Shaun Frame and the City of Columbus, have discriminated against him on the basis of his disability in violation of the Americans with Disabilities Act ("ADA"), § 504 of the Rehabilitation Act of 1973, and Ohio Revised Code Chapter 4112. He also alleges intentional infliction of emotional distress. This matter is

before the Court on Defendants' motion for summary judgment. (Record at 17).

I. Facts

Plaintiff John Ford began working for the City of Columbus in 1988. Since April of 1993, he has been employed at the Division of Water as a Plant Maintenance Mechanic. When he first began working there, he was assigned to perform preventative maintenance functions so that he could become familiar with the water plant to which he had been assigned. (Ford Dep. at 14). According to Ford, no other employees liked to do preventative maintenance ("PM"). Ford, however, liked the PM jobs, which were generally less strenuous, because he had recently had arthroscopic surgery on both knees. (Ford Dep. at 10, 14).

Ford's supervisor at that time was Harry McDonald. Ford told McDonald that he would be interested in performing PM on a permanent basis. (Ford Dep. at 14). McDonald allegedly met with the other employees and said that since no one else liked doing PM, he was planning to leave Ford on that assignment for the time being. (Ford Dep. at 15). Ford worked PM for approximately seven months and performed other duties as assigned. (Ford Dep. at 17). However, his job title never changed. (Ford Dep. at 15). Preventative maintenance is, and always has been, part of the job responsibilities of the Plant Maintenance Mechanics. There has never been a separate job title for a PM mechanic. (Ford Dep. at 15, Frame Dep. at 47).

On October 1, 1993, Ford injured his elbow, neck, and back on the job. He was diagnosed with myositis, sprain,

right shoulder and neck sprain. (Ex. 3 to Mem. in Opp'n to Defs.' Mot. Summ. J.). McDonald allowed him to perform light duty maintenance for the next three days. However, by October 4, 1993, Ford's pain was so severe that he could no longer work. He collected workers' compensation for the next three months.

On January 4, 1994, Ford returned to work. During Ford's absence, McDonald had been promoted and been replaced by Defendant Shaun Frame. Ford again requested light duty preventative maintenance (Frame Dep. at 62). He was told that there were no "light duty" assignments; he had to return to work with no restrictions. (Ford Dep. at 25, Frame Dep. at 59). Frame told Ford that he did not think that it was fair to leave him on PM on a permanent basis. He planned to institute a rotation system whereby PM duties would be rotated among all plant maintenance mechanics at regular intervals.[1] (Ford Dep. at 22). Ford was therefbre required to perform the same duties, on the same rotation schedule, as the other plant maintenance mechanics.

In March of 1994, Ford was diagnosed with a large herniated disc and had back surgery. (Ex. 5 to Mem. in Opp'n to Defs.' Mot. Summ. J.). He recuperated at home, collecting workers' compensation until the end of May. On July 28, 1994, Plaintiff made a written request to perform full-time preventative maintenance as a reasonable accommodation for his disability. (Ex. 2 to Mem. in Opp'n to

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[1]There were, however, some plant maintenance mechanics who disliked PM and were not required to participate in the rotation. (Ford Dep. at 24).

Defs.' Mot. Summ. J.). Ford stated that although he could perform all of the essential functions of his job, he did not have as many problems with his knees when he was allowed to work PM.

On August 16, 1994, Ford reinjured himself at work. He was diagnosed with cervical sprain/strain. An MRI performed in September of 1994 indicated a probable disc herniation/spur and post-surgical change. On January 25, 1995, presumably in response to Ford's request for an accommodation, the City sent a letter to Dr. David Leak, Plaintiff's treating physician, asking the doctor to indicate which of the essential functions of the plant maintenance mechanic position Ford was unable to perform. Dr. Leak responded that Ford was able to perform all of the essential functions 100% of the time. (Ex. 3 to Defs.' Mot. Summ. J.). Based on that response, the City determined on May 8, 1995 that there was no reason to grant Ford's request for accommodation.

In May of 1995, the Bureau of Workers' Compensation referred Ford for an independent medical examination. Dr. Gerald Steiman diagnosed Ford with post-fusion syndrome with chronic discomfort and pain, pain induced weakness and reduced range of motion. He noted that this was a permanent condition and that Ford would be unable to return to his job unless minor restrictions were made. Specifically, he stated that Ford should not lift more than 75 pounds. (Ex. 8 to Mem. in Opp'n to Defs.' Mot. Summ. J.). Ford was awarded an 18% permanent partial disability rating.

Early in 1996, while John Baker, a fellow plant maintenance mechanic, was assigned PM as part of the

regular rotation, Baker suffered a heart attack and had surgery.[2] While Baker was off work, Plaintiff was asked to perform more of the PM duties until Baker returned. However, once Baker returned, Ford was forced to return to the regular rotation. (Ford Dep. at 41-42).

Ford filed a charge of discrimination with the Ohio Civil Rights Commission on June 20, 1995 and received a right to sue letter on December 6, 1996. In March of 1997, he filed suit alleging claims under the ADA, § 504 of the Rehabilitation Act, and Ohio Revised Code Chapter 4112, as well as intentional infliction of emotional distress. He claims that Frame told him on several occasions that he should be taken out and shot like a lame horse. (Ford Dep. at 57). Ford also claims that one evening, Frame phoned Ford's house six times in one evening looking for him. According to Ford, when he returned the phone call, Frame sounded intoxicated and wanted to know if Ford would meet him somewhere to fight. Ford allegedly told him he would be willing to meet to talk and Frame agreed to meet with him the next day. (Ford Dep. at 59-60). Frame denies that these incidents occurred. (Frame Dep. at 69-70). Ford has attended counseling sessions for stress at the state rehabilitation center for injured workers. (Ford Dep. at 62-63).

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[2]Several years earlier, Baker had allegedly asked if he could be assigned to PM on a permanent basis because of certain health problems. McDonald consulted Frame about Baker's request, Frame expressed concerns about possible resentment among the other mechanics and Baker's request was refused. (Frame Dep. at 63-67).

In June of 1997, Ford transferred to a different water plant with a different supervisor. He continues to work as a Plant Maintenance Mechanic and, as before, performs PM on a rotating basis. (Ford Dep. at 46). He admits that he is able to perform all jobs assigned to him, although it may take him a little longer because of his prior injuries. (Ford Dep. at 61). He contends that his stress level has reduced tremendously now that he is no longer working with Mr. Frame. (Ford Dep. at 63-64).

II. Standard for Granting Motion for Summary Judgment

Fed. R. Civ. P. 56(c) provides "[Summary judgment] . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

"[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original); Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984).

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," Anderson, 477 U,S. at 248. The purpose of the procedure is not to resolve factual issues, but to determine if

there are genuine issues of fact to be tried. Lashlee v. Sumner, 570 F.2d 107, 111 (6th Cir. 1978). Therefore, summary judgment will be granted "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is . . . [and where] no genuine issue remains for trial, . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 467 (1962) (quoting Sartor v. Arkansas Natural Gas Com., 321 U.S. 620, 627 (1944)); accord County of Oakland v. City of Berkley, 742 F.2d 289, 297 (6th Cir. 1984).

In making this inquiry, the standard to be applied by the Court mirrors the standard for what was formerly referred to as a directed verdict. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson, 477 U.S. at 250.

> "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745, n. 11 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson, 477 U.S. at 251-52. Accordingly, although summary judgment should be cautiously invoked, it is an integral part of thc Federal Rules, which are designed "to secure the just, speedy and inexpensive determination of every action." Celotex, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (footnote omitted); accord Adams v. Union Carbide Corp., 737 F.2d 1453, 1455-56 (6th Cir.), cert. denied, 469 U.S. 1062 (1984). Inferences to be drawn from the underlying facts contained in such materials must also be considered in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Watkins v. Northwestern Ohio Tractor Pullers Ass'n, 630 F.2d 1155, 1158 (6th Cir. 1980). Additionally, "unexplained gaps" in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. Adickes, 398 U.S. at 157-60.

If the moving party meets its burden and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. The existence of a mere scintilla of evidence in support of the opposing party's position is insufficient; there must be evidence on which the

jury could reasonably find for the opposing party. Anderson, 477 U.S. at 252.

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(c).

III. Discussion

A. Admissibility of Evidence

In ruling on a motion for summary judgment, the Court may consider "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact." Fed. R. Civ. P. 56(c). While Defendants have not filed a separate motion to strike, they contend that the Court should not consider the vast majority of exhibits attached to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment. These exhibits consist of medical records from Ford's workers' compensation file. Plaintiff, however, has included no affidavit certifying or authenticating the documents as required by Rule 56(e). Defendant therefore

contends that these documents are not sufficiently authenticated.

In response, Plaintiff argues that the workers' compensation file was attached to Defendants' answers to Plaintiffs' first set of interrogatories and that, since Defendants' counsel attached an affidavit swearing that the answers were true and correct, no further authentication is needed.[3]

The Court finds that Defendants are estopped from asserting that the documents contained in the workers' compensation file were not properly authenticated. Defendants swore under oath that the answers to Plaintiffs interrogatories were true and attached the workers' compensation file in response to one of those questions. Plaintiffs are entitled to rely on Defendants' representation that this was Ford's workers' compensation file. Defendants cannot now argue that the information they provided in discovery is not sufficiently authenticated.

Indeed, other courts have held that production of documents is at least circumstantial, if not conclusive, evidence of authenticity. See Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1223 (E.D. Pa. 1980), aff'd in part and rev'd in part sub nom. In re

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[3]Specifically, interrogatory number 8 asked, "State whether the Plaintiff ever sustained a work-related injury and, if so, when and to whom said injury was reported." Plaintiff responded, "Plaintiff sustained work related injuries as noted in his bureau of workers' compensation file attached as attachment 1. Said attachment also contains reporting paperwork."

Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 284-85 (3d Cir. 1983), rev'd on other grounds, 475 U.S. 534 (1986); FTC v. Hughes, 710 F. Supp. 1520, 1522 (N.D. Texas 1989). Furthermore, there is no indication that the medical records are not authentic and Defendants have not shown that the lack of an accompanying affidavit has prejudiced them in any way. The Court will therefore consider the attached documents in ruling on the motion for summary judgment.

B. Americans with Disabilities Act/Rehabilitation Act

Plaintiff contends that Defendants are liable for refusing to accommodate his disability. He seeks relief for violations of the Americans with Disabilities Act ("ADA") and § 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), both of which prohibit discrimination against the disabled. The two statutes are very similar in purpose; however, while the Rehabilitation Act applies only to entities receiving federal funds, the ADA also applies to private entities. Since the analysis of claims under these two statutes is roughly parallel, they may be considered together. Monette v. Elec. Data Sys. Co., 90 F.3d 1173, 1177 (6th Cir. 1996).

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . terms, conditions and privileges of employment." 42 U.S.C. § 12112(a).[4] There is no dispute that the City of Columbus is

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[4]Section 504 of the Rehabilitation Act states: "No otherwise qualified individual with a disability in the United States . . . shall solely by reason of his or her disability, be excluded from participation in, or be denied the benefits of, or be subject to

subject to both the ADA and the Rehabilitation Act. A "qualified individual with a disability" means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds." 42 U.S.C. 12111(8); 42 U.S.C. § 12112(b)(5)(B).

In order to establish a prima facie case of disability discrimination in a failure to accommodate claim, the Plaintiff must show: (1) he has a disability; (2) he is otherwise qualified for the job; and (3) Defendants refused to make a reasonable accommodation for his disability. Smith v. Ameritech, 129 F.3d 857, 866 (6th Cir. 1997); Rousch v. Weastec, Inc., 96 F.3d 840, 843 (6th Cir. 1996).

1. Disability

Plaintiff must first show that he is "disabled" within the meaning of the ADA. The ADA defines a "disability" as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2). A person is substantially limited in a major life activity if that person is "[u]nable to perform a major life activity that the average person in the general population can perform" or is "[s]ignificantly restricted as to the condition, manner or

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discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

duration under which [the person] can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1).

Major life activities are functions like caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). Factors to be considered include: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. 29 C.F.R. § 1630.2(j).

In order to demonstrate that an impairment substantially limits the major life activity of working, an individual must show a significant restriction in the "ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities . . . the inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

Ford contends that he is disabled. He claims that he has a physical impairment which substantially limits his ability to perform manual tasks and work, and that he has a record of such impairment. Defendants, on the other hand, contend that since Dr. David Leak, Ford's treating physician, indicated that Ford can perform all of the essential functions of his job 100% of the time with no restrictions, Ford cannot be deemed "disabled."

Plaintiff argues that since the Industrial Commission found that Ford had a permanent, partial disability of 18% and the City of Columbus agreed to pay his workers' compensation claim, the City is now estopped from denying that Ford is disabled. The doctrine of judicial estoppel "forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding." Teledyne Indus., Inc. v. Nat'l Labor Relations Bd., 911 F.2d 1214, 1217 (6th Cir. 1990).

The Sixth Circuit has recently addressed this issue and concluded that an employer's agreement to settle a workers' compensation claim does not mean that the employee is automatically qualified as a disabled person under the ADA. Lamb v. Bell County Coal Corp., No. 98-5751, 1999 WL 717976 (6th Cir. Sept. 9, 1999). The Court noted that even if the company admitted that the employee had a permanent disability, this did not necessarily show that the impairment substantially limited one of his major life activities. Id. at **5.[5]

Likewise, in Vulcu v. Trionix Research Laboratory, Inc., 993 F. Supp. 623, 627 (N.D. Ohio 1998), the Court noted that a "physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA . . . To

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[5]Other courts have also found that employees may be permanently disabled for workers' compensation purposes, yet still be able to perform major life activities or perform the essential functions of a job with or without reasonable accommodation. See Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995); Bolton v. Scrivner, Inc., 36 F.3d 939, 944 (10th Cir. 1994), cert. denied, 513 U.S. 1152 (1995).

rise to the level of a disability, an impairment must significantly restrict an individual's major life activities. Impairments that result in only minor limitations are not disabilities." (internal citations omitted).

Based on Lamb and Vulcu, the Court finds that the City of Columbus is not estopped from asserting that Ford is not disabled within the meaning of the ADA simply because he was awarded workers' compensation and found to be permanently partially disabled. Furthermore, Ford has failed to create a triable issue of fact regarding whether he is substantially limited in the major life activities of working and performing manual tasks. Ford's own treating physician indicated that Ford could perform all of the essential functions of his job as a Plant Maintenance Mechanic 100% of the time. Ford's own request for accommodations also indicates that he can perform all of the essential functions of his job; he merely notes that working on a ladder causes "stiffness, pain and swelling to my knees." (Ex. 2 to Ford Dep.). Ford further testified that since he moved to a new water plant in 1997, he has made no further requests for accommodation and he is currently able to perform all of the tasks which he is required to do as a Plant Maintenance Mechanic, although it might take him a "little bit longer" or he may have to do them a "little bit differently." (Ford Dep. at 54, 61).

Although the record is clear that Ford does suffer from a physical impairment of his back and both knees, Ford had failed to show that these impairments substantially limit a major life activity within the meaning of the ADA. He has not put forth sufficient evidence from which a jury could reasonably conclude that his prior injuries significantly restrict his ability either to work or to perform manual tasks. Since

Ford has failed to show that he had a disability, Defendants are entitled to summary judgment on the ADA and Rehabilitation Act claims. However, as noted below, even if the Court found that Ford was disabled his claim would still fail because he cannot show that his requested accommodation is objectively reasonable.

2. Otherwise Qualified

In order to satisfy the second element of the prima facie case, Plaintiff must show that he is "otherwise qualified" to perform his job as a Plant Maintenance Mechanic. He is qualified if he has the requisite skills, experience, and education, and if he can perform, with or without reasonable accommodation, the essential job functions of the employment position he "holds" or "desires." 42 U.S.C. § 12112(8); 29 C.F.R. § 1630.3(m).

Defendants contend that Plaintiff cannot meet this test. There is no dispute that Ford has the requisite skills, experience, and education for the job which he "holds," that of Plant Maintenance Mechanic. However, that job description, which must be considered in determining which functions are essential, indicates that Plant Maintenance Mechanics must be able to "exert one-hundred (100) pounds of force." (Ex. 2 to Frame Dep.). Plaintiff had not argued that this is not an essential function of the job.

Whether Plaintiff can exert one-hundred pounds of force, and therefore whether he can perform all of the essential job functions, appears to be a disputed issue of fact. On April 25, 1995, one physician concluded that Ford could perform all of the essential functions of his job as a Plant

Maintenance Mechanic, including "heavy lifting, pushing, pulling (up to 100 pounds occasionally . . .)." (Ex. 3 to Defs.' Mot. Summ. J.). However, in his June 5, 1995 report, Dr. Gerald Steiman indicated that Ford should not lift more than 75 pounds. (Ex. 8 to Pl.s' Mem. Opp'n Mot. Summ. J.). However, since Plaintiff has failed to satisfy the other elements of the prima facie case, this is not a material dispute and the Court need not determine whether Ford is otherwise qualified to perform all of the essential functions of his current position as Plant Maintenance Mechanic.

Alternatively, Defendants also argue that Ford cannot satisfy this prong of the test because even though Ford "desires" a "preventative maintenance" job, no such job exists. The Court agrees that in analyzing whether Plaintiff can perform the essential functions of the position he holds or desires, the focus must be either on his current job position, or on another job position that is currently in existence. It is improper to focus on a "position" that does not exist.[6] PM is

---

[6]In a recent Sixth Circuit case, the Court held that in determining whether an employee was "otherwise qualified" for a position, the Court must look to the original position, rather than the original position as temporarily modified to accommodate a disability on a short-term basis. Norsworthy v. The Kroger Company, No. 98-6604, 2000 WL 32026 (6th Cir. Jan. 6, 2000). The plaintiff in that case was a general labor production worker who injured her back. Her physician said she could work no more than four hours per day and was restricted in the amount of weight she could lift and the frequency of lifting, bending, and stooping. Her employer created a temporary part-time light-duty position to accommodate her. Several months later, she had shown no signs of physical improvement. The employer terminated her employment

part of the Plant Maintenance Mechanic position. The parties agree that there is no separate PM job description or classification and Defendant has never sought applicants for such a job. Since the position "desired" does not technically exist, it is impossible for Plaintiff to show that he can perform the essential functions of that job.[7]

3. Reasonable Accommodation

If an employee cannot perform the essential functions of his job without accommodations, he must show that he can perform those essential functions with reasonable accommodation. The ADA states that an employer discriminates against a disabled individual by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such

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after it determined there were no permanent job positions which would accommodate her restrictions. She filed suit. Although she argued that she was otherwise qualified for the *temporary* part-time position that had been created for her, the Court held that she must instead show that she was otherwise qualified for her *original* position, something she could not do.

See also Allen v. Georgia Power Co., 980 F.Supp. 470, 477 (N.D. Ga. 1997)(holding that plaintiff's ability to perform "light duty" tasks to which he was assigned after he was injured was not the equivalent of being able to perform the essential functions of his regular position.

[7]Plaintiff's argument that a de facto PM job exists will be considered in the next section of this Memorandum.

covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business . . ." 42 U.S.C. § 12112(b)(5)(A). The disabled individual, however, "bears the initial burden of proposing an accommodation and showing that that accommodation is objectively reasonable." Monette, 90 F.3d at 1183.

Federal regulations indicate that reasonable accommodations may include job restructuring or reassignment to a vacant position. 29 C.F.R. § 1630.2(o)(2), In this case, Ford has proposed that his job be restructured so that he can perform all of the PM tasks on a permanent basis so that his prior injuries are not aggravated by the heavier work otherwise required of Plant Maintenance Mechanics. He also proposes that other mechanics be assigned to perform all tasks which require lifting more than 75 pounds. However, Ford fails to show that these proposed accommodations are objectively reasonable.

The ADA does not require an employer to eliminate essential job functions to accommodate a disabled employee. Barnett v. U.S. Air, 157 F.3d 744, 750 (9th Cir. 1998); Holbrook v. City of Alpharetta, 112 F.3d 1522, 1528 (11th Cir. 1997). As noted earlier, Defendants contend that being able to exert 100 pounds of force is an essential physical requirement assuming that Ford can no longer perform this essential job function, Defendants need to eliminate that requirement in order to accommodate Ford's alleged disability.

The Sixth Circuit has noted that "the ADA does not require employers to create a new position for a disabled employee who can no longer perform the essential functions

of his job." Smith v. Ameritech, 129 F.3d at 867. It is undisputed that no "Preventative Maintenance Mechanic" position currently exists. Defendants are not required to create that new job title to accommodate Ford's alleged disability. Furthermore, the Equal Employment Opportunity Commission Technical Assistance Manual on the ADA, at 9.4, also states that "[t]he ADA does not require an employer to create a "light duty" position unless the "heavy duty" tasks an injured worker can no longer perform are marginal job functions which may be reallocated to co-workers as part of the reasonable accommodations of job restructuring."

In this case, the "heavy duty" tasks of Plant Maintenance Mechanics cannot be considered *marginal* job functions; they are essential functions and an integral part of the job. If Defendants were to accept Ford's proposed accommodations, the other mechanics would be burdened with all of the more difficult, physically demanding tasks, a result that is not required by the ADA. 29 C.F.R. 1630.2(p)(2)(v)(noting that the impact of a proposed accommodation on the ability of other employees to perform their duties is a factor to be considered); Milton v. Scrivener, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995)(holding that accommodations which require coworkers to work harder or longer is not required under the ADA).

Defendant Frame noted that the PM rotation schedule was established at least in part because, in the past, employees had complained when they were routinely assigned to do the heavy, hard work while others were assigned to easier PM tasks like changing oil. (Frame Dep. at 22-23). By rotating the more physically challenging jobs with the easier ones, the work load was distributed more fairly. Therefore, despite

Plaintiff's contention that some other mechanics do not like to perform PM functions and would not mind if he were allowed to concentrate his efforts in this area, Defendants appear to have a legitimate reason for requiring the mechanics to rotate through the various tasks.

Plaintiff has argued that even if no permanent PM position existed on paper, it was a de facto position, and one that should be considered "vacant."[8] Ford notes that when he first started his job, after his knee surgery, McDonald allowed him to perform all of the PM tasks for seven months because on one else wanted to do them; however, when Defendant Frame became his new supervisor, Frame made him rotate through all of the jobs. Plaintiff believes that Frame intentionally discriminated against him based on his disability.

Even if Ford was previously allowed to perform all of the PM tasks, Defendants are not required to continue to accommodate him in the same manner. See Hill v. Harper, 6 F. Supp. 2d 540, 544 (E.D. Va. 1998)(holding that even though sheriff had been allowed to work in the control room for three years in order to accommodate his disability, employer was not required to continue this accommodation because it eliminated the essential function of being able to rotate through five different duty posts); Allen v. Georgia Power Co., 980 F. Supp. 470, 478 (N.D. Ga. 1997)(holding that "[p]laintiff's proffered accommodation is not made reasonable by the fact that Defendant permitted Plaintiff to

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[8]Reassignment to a "vacant" position is a potential reasonable accommodation. 29 C.F.R. § 1630.2(o).

remain at work on "light duty" for the two and one-half years following Plaintiff's injury").

Therefore, despite the fact that Ford was allowed to work PM for seven months prior to his injury, Defendants are not required to create a permanent light duty position for him and should not be punished for their initial attempts to accommodate his alleged disability. As the Sixth Circuit noted in Smith, exposing the employer to liability for exceeding what is required by law would act as a deterrent, undermining the purposed of the ADA. 129 F.3d at 868.

Plaintiff also argues that not only did Defendants allow him to remain in the de facto PM position for a period of time, but they also allowed John Baker the same luxury when he was recuperating form heart surgery. Plaintiff argues that Defendants' refusal to accommodate him in the same manner constitutes disparate treatment. Defendants deny that Baker was ever assigned to PM on a permanent basis. However, even if he was, Defendants were not obligated to provide that same accommodation to Ford. In Smith, the Sixth Circuit held that "an employer who provides an accommodation that is not required by the ADA to one employee is not consequentially obligated to provide the same accommodation to other disabled employees." 129 F.3d at 867.

4. Individual Liability

Plaintiff has also sued Defendant Shaun Frame in his individual capacity for disability discrimination. The Court finds that, as a matter of law, Frame is also entitled to summary judgment of Plaintiff's ADA and Rehabilitation Act claims. The ADA does not provide for individual supervisor

liability. Wathen v. Gen. Elec. Co., 115 F.3d 400, 406 (6th Cir. 1997)(holding that individuals who are not "employers" cannot be liable under Title VII); Meekison v. Voinovich, 17 F. Supp. 2d 725, 729 (S.D. Ohio 1998)(holding that individuals cannot he held liable under the ADA).

Plaintiff argues that the public policy reasons behind the Ohio Supreme Court's recent decision to impose liability on supervisors for discrimination under state law should be extended to federal law. See Genaro v. Central Transport, Inc., 84 Ohio St. 3d 293 (1999). However, the current law of this circuit, which the Court is obligated to follow, dictates that supervisors cannot be held individually liable for disability discrimination claims.

C. State Law Claims

Plaintiff has also alleged state law claims, including a violation of Ohio Revised Code Chapter 4112 and intentional infliction of emotional distress. However, since the Court will grant summary judgment on all of Plaintiff's federal claims, it declines to exercise jurisdiction over Plaintiff's supplemental state law claims. See United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966)(holding that if the federal claims supporting supplemental jurisdiction are dismissed prior to trial, the state claims should be dismissed as well).

IV. Conclusion

For the foregoing reasons, Defendants' motion for summary judgment (Record at 17) is **GRANTED.** The Clerk is directed to enter judgment of Defendants on Plaintiff's

claims under the Americans with Disabilities Act and the Rehabilitation Act. Plaintiff's state law claims are **DISMISSED WITHOUT PREJUDICE.**

IT IS SO ORDERED.

/s/_____
John D. Holschuh, Judge
United States District Court

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed March 7, 2001]

No. 00-3679

JOHN H. FORD, III, *Plaintiff-Appellant*,
v.
SHAUN FRAME; CITY OF COLUMBUS, *Defendants-Appellees*.

Before: BOGGS and MOORE, Circuit Judges; COHN, District Judge.*

Petitioner seeks rehearing of this court's January 26, 2001, order affirming the district court's judgment for the defendants in his employment discrimination action filed under the Americans with Disabilities Act, 42 U.S.C.

*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

§ 12101, *et seq.*, and § 504 of the Rehabilitation Act of 1973.

After careful consideration, the panel concludes that it acted under no misapprehension of law or fact in issuing its order. Fed. R. App. P. 40(a).

Accordingly, it is ordered that the petition for rehearing be, and it hereby is, denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Clerk

APPENDIX E

PETITIONER'S REQUEST FOR REASONABLE ACCOMMODATION RECOMMENDATION

City of Columbus
Mayor Gregory S. Lashutka

DEPARTMENT OF ADMINISTRATIVE SERVICES
Maureen A. Conley, Director

REQUEST FOR REASONABLE ACCOMMODATION RECOMMENDATION

PERSON REQUESTING ACCOMMODATION(S):

JOHN FORD, PLANT MAINTENANCE MECHANIC

DEPARTMENT/DIVISION:

PUBLIC UTILITIES/WATER

The information in the Request form submitted by the employee and the most recent medical documentation indicate that Mr. Ford is fully capable of performing all essential functions of his current position.

Therefore, it is the recommendation of this office that the information provided in the instant case does not support the need for any reasonable accommodation.

/s/_____ 5/8/95

Scott S. Messer, J.D. Date

EEO Specialist/ADA Coordinator

APPENDIX F

LETTER FROM ATTORNEY KEVIN J. O'BREIN TO PETITIONER

April 19, 2000

Mr. John Ford
5056 Nelson Dr.
South Bloomfield, OH 43103

Re: John Ford v. Shaun Frame, et al.

Dear Mr. Ford:

On April 13, 2000, Judge Holschuh issued his opinion in the captioned case, a copy of which is enclosed, herewith. Unfortunately, Judge Holschuh had granted the City's Motion of Summary Judgement and dismissed your lawsuit against the City and Shaun Frame.

It is apparent from the opinion that Judge Holschuh picked up on the comments of your treating physician, Dr. Leak, who stated on January 25, 1995, that you were able to perform all of the essential functions of Plant Maintenance Mechanic position "100% of the time," at pp. 3, 11. The Court also picked up on the statement you wrote in your request for accommodation wherein you admitted that you could perform all the essential functions of the job and that working on a ladder merely caused "stiffness, pain and swelling too my knees," at p. 11.

In analyzing whether you could perform the essential functions of the position you held (Plant Maintenance Mechanic) the Court found that "the focus must be on (your) current job position, or on another job position that is currently in existence. It is improper to focus on a "position" that does not exist," --the preventive maintenance job, p. 13.

We have considered whether we should prosecute an appeal to the Sixth Circuit in your case but have concluded that, based upon the cogent opinion of trial court, the likelihood of reversing the judgment of the trial court is slim. Accordingly, we must decline to file an appeal on your behalf. If you would like to appeal the decision of the trial court we urge you to obtain alternate counsel immediately and file your notice of appeal with the District Court not later than Friday, May 12, 2000.

John, we regret that we were not able to defeat the City's Motion for Summary Judgment. Unfortunately, some of the information contained in your medical records does not support your claim that you are "disabled" and that Court found this information, particularly the comments of Dr. Leak, to be controlling.

If you have any questions concerning the Court's opinion, please contact my office for an appointment. I am,

Very truly yours,

/s/_____
Kevin O'Brien

encl:

APPENDIX G

U.S. Department of Justice
Civil Rights Division
NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

Washington, DC 20530

December 3, 1996

CERTIFIED MAIL
Mr. John H. Ford, III
5056 Nelson Drive
Ashville, Ohio 43103

Re: EEOC Charge Against City of Columbus, Water Division
No. 22A953714

Dear Mr. Ford:

Because you filed the above charge with the Equal Employment Opportunity Commission, and the Commission has determined that it will not be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over that charge, and this Department has determined that it will not file any lawsuit based thereon within the time, and because you have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111, et seq., against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate Court within 90 days of your receipt of this Notice. If you are unable to retain an attorney, the Court is authorized in its discretion to appoint an attorney to represent you and to authorize commencement of the suit without payment of fees, costs, or security as provided for in Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, referred to in Section 107(a) of the Americans with Disabilities Act, 42 U.S.C. 12117(a). In order to apply for an appointed attorney, you should, well before the expiration of the above 90-day period, take this Notice, along with any correspondence you have received from the Justice Department or the Equal Employment Opportunity Commission, to the Clerk of the Court.

The investigative file pertaining to your case is located in the EEOC District Office, Skylight Office Tower, Suite 850, 1660 West Second Street, Cleveland, Ohio 44113-1454.

This Notice should not be taken to mean the Department of Justice had made a judgment as to whether or not your case is meritorious.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division
By: Kenneth Greaves for
Rita L. Wilson
Civil Rights Analyst
Employment Litigation Section

cc: EEOC District Office
City of Columbus, Water Division

APPENDIX H

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Cleveland District Office

Charge No.: 22A953714
Respondent: City of Columbus
Water Division

John H. Ford, III
5056 Nelson Drive
Ashville, Ohio 43103

Dear Mr. Ford:

The Commission has received your request for Notice of Right of Sue in the above referenced charge. Your request will be forwarded to the U.S. Department of Justice for action. That Agency will act on your request as soon as possible and issue the Notice directly to you.

If you have any questions, please call Larry E. Lenin, State and Local Coordinator at 216/522-7432

Sincerely,

Dorothy J. Porter
District Director

Jul 30 1996
Date

APPENDIX I

OHIO CIVIL RIGHTS COMMISSION

May 10, 1996

JOHN H FORD III
5056 NELSON DRIVE
ASHVILLE OH 43103

MICHAEL C MATUSKA
DEPARTMENT OF PUBLIC UTILITIES
DIVISION OF WATER
CITY HALL ROOM 200
90 WEST BROAD STREET
COLUMBUS OH 43215

SUBJECT: John Ford III v. City of Columbus, Department of Public Utilities, Division of Water
(Col) B1012395 (22620) 062095
22A 95 3714

In regular session on May 9, 1996, the Ohio Civil Rights Commission denied Respondent's request for reconsideration.

After thorough review of the request and the entire investigation, the Commission determined that insufficient reason for reconsideration has been presented.

If you have any questions concerning this action, please contact Beleta R. Ebron, Columbus Regional Director, at (614) 466-5928.

FOR THE COMMISSION

/s/_____
Mark Kautzmann
Compliance Manager

cc: Beleta R. Ebron, Columbus Regional Director

APPENDIX J

OHIO CIVIL RIGHTS COMMISSION

April 18, 1996

John H. Ford III
5056 Nelson Drive
Ashville, OH 43103

Michael C. Matuska, Assistant City Attorney
City of Columbus, Department of Public Utilities,
Division of Water
City Hall, Room 200
90 West Broad Street
Columbus, OH 43215

B1012395 (22620) 062095, 22A 95 3714

The Charging Party, John H. Ford III, has filed an affidavit with the Ohio Civil Rights Commission alleging that he has been denied an accommodation by Respondent, City of Columbus, Department of Public Utilities, Division of Water, because of his disabilities, herniated disk and torn knee cartilage.

All jurisdictional requirements for filing a charge have been met.

Evidence substantiates that Charging Party was denied an accommodation of his disabilities. Evidence substantiates that Charging Party twice requested an accommodation but that it

was denied by Respondent who claims that the requested position does not exist. Evidence and witness testimony substantiate that the requested position does exist. Witness testimony substantiates that Charging Party's supervisor has made negative remarks about accommodation and people with disabilities.

Upon investigation, the Ohio Civil Rights Commission has determined that it is **PROBABLE** that Respondent has engaged in practices unlawful under Section 4112, Ohio Revised Code.

Notice of Right to Request Reconsideration

You have the right to request reconsideration of this determination of the Commission. Such application must be in writing and state specifically the grounds upon which it is based.

This request must be sent to the Compliance Department, Ohio Civil Rights Commission, 220 Parsons Avenue, Columbus, Ohio 43266-0543. You must make this request for reconsideration within **TEN (10)** days of the date of mailing of this notice. Any application for reconsideration received by the Compliance Department in the Commission's Columbus Central Office after the ten day period has expired will be deemed untimely filed.

APPENDIX K

PETITIONER'S CHARGE OF DISCRIMINATION WITH THE OHIO CIVIL RIGHTS COMMISSION AND EEOC

[Fold-out]

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY	CHARGE NUMBER
[X] FEPA [X] EEOC	B1012395(22620)062095 22A 95 3714

OHIO CIVIL RIGHTS COMMISSION and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.)	HOME TELEPHONE (Include Area Code)
Jchn H. Ford III	614-983-4124

STREET ADDRESS	CITY, STATE AND ZIP CODE	DATE OF BIRTH
5073 S. Walnut St., Lot 86	Ashville, OH 43103	7/10/59

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME	NUMBER OF EMPLOYEES, MEMBERS	TELEPHONE (Include Area Code)
City of Columbus, Water Division	+15	614-645-7020

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY
910 Dublin Rd., Room 4105	Columbus, OH 43215-9060	Franklin

NAME	TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

[ ] RACE [ ] COLOR [ ] SEX [ ] RELIGION [ ] NATIONAL ORIGIN
[ ] RETALIATION [ ] AGE [X] DISABILITY [ ] OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST (ADEA/EPA) LATEST (ALL)
Prior to and on 1/23/95

[ ] CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I suffer from a Herniated Disk and Torn Cartilage of both knees and I am a qualified disabled person as defined by Section 4112.01 (A)(13) of the Ohio Revised Code. I can safely and substantially perform the job duties in question.

1. I suffer from a Herniated Disk and Torn Cartilage of both knees. I have been employed by the above cited Respondent from November 12, 1988, most recently in the position of Plant Maintenance Mechanic. I have been harassed and on January 23, 1995, I was denied reasonable accommodation.
2. On January 23, 1995, I was told verbally by Shawn Frame, not disabled, Supervisor, that I could not return to work in a Preventive Maintenance position because none were available and before I could return to work at all that I would have to go through the Personnel Department.
3. I believe I have been harassed and denied reasonable accommodation due to the above cited reasons because:

   a) I had worked in a Preventive Maintenance position since 1992, under another supervisor. Since Shawn Frame became supervisor I have been denied a permanent job in this position. Respondent has been aware of my disability for at least two years.
   b) Frame had made jokes about people with disabilities, that they should be shot like horses who break legs. Oliver Christian, disabled, co-worker, has been given reasonable accommodation by Respondent.
   c) I have been told to either work in my regular position or go on permanent disability by Respondent.
   d) I have filed a grievance with the City of Columbus EEO and was told by Scott Metzer, EEO, and non-disabled, that I did not need reasonable accommodation.

[X] I also want this charge filed with the EEOC.
I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

6-20-95
Date

John H. Ford III
Charging Party (Signature)

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

John H. Ford III

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Month, day, and year)

JUN 20 1995

OHIO CIVIL RIGHTS COMMISSION

Diane Thompson

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
AUG 29 2001
OFFICE OF THE CLERK

No. 01-194

In The

Supreme Court of the United States

JOHN H. FORD, III,

Petitioner,

v.

SHAUN FRAME; CITY OF COLUMBUS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL C. MATUSKA
Counsel of Record
CITY OF COLUMBUS, DEPARTMENT OF LAW
JANET E. JACKSON, City Attorney
City Hall, Room 200
90 West Broad Street
Columbus, Ohio 43215-9013
(614) 645-7385

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the Sixth Circuit err in upholding the District Court's decision to grant summary judgment to Defendants for failure of Plaintiff to establish a prima facie case of handicap discrimination under the Americans With Disabilities Act or the Rehabilitation Act?

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STATEMENT OF THE CASE

Petitioner, John Ford was employed as a Plant Maintenance Mechanic with the City of Columbus, Department of Public Utilities, Division of Water. The position is labor intensive and requires installing, maintaining, and removing industrial equipment.

Petitioner was injured in October 1993 and went on Workers' Compensation until January 1994. In March of 1994, Petitioner was diagnosed with a herniated disk, had surgery, and collected Workers' Compensation until May.

In July 1994, Petitioner requested to perform preventative maintenance full time as an accommodation to his alleged disability. Preventative maintenance is not a separate position, but only one of a full range of duties required as a Plant Maintenance Mechanic.

Petitioner's doctor was contacted concerning the accommodation request. The doctor indicated that Petitioner was able to perform all of the essential functions of his position one-hundred percent of the time. Based on the medical information provided by the doctor, the City of Columbus determined there was no support for a reasonable accommodation.

In March 1997, Petitioner filed a complaint in United States District Court for the Southern District of Ohio based upon a violation of the Americans With Disabilities Act (ADA). Defendants filed a Motion for Summary Judgment in March 1999 and on April 12, 2000, the United States District Court granted Defendants' motion.

Petitioner appealed this decision pro se to the United States Court of Appeals for the Sixth Circuit. On January

26, 2001, the Sixth Circuit upheld the decision of the lower court. Petitioner's request for a rehearing in the Sixth Circuit was denied on March 7, 2001.

REASONS FOR DENYING THE PETITION

The Petition should be denied because Petitioner has failed to assert any meritorious reason to review the decision of the Sixth Circuit Court of Appeals. Rule 10 of the Rules of the Supreme Court of the United States specifies that "A petition for a writ of certiorari will be granted only for compelling reasons." Petitioner's single paragraph as to the reasons why the writ of certiorari should be granted does not present any reasons why, in the discretion of this Court, such writ should be granted.

The Sixth Circuit did not err in affirming the District Court's decision to grant summary judgment to Respondents. The District Court properly found that Petitioner did not establish a prima facie case of handicap discrimination.

1. Petitioner's Questions Presented for Review Are Not Properly Before the Court.

The case below relates to Petitioner's request in July 1994 for a reasonable accommodation under the Americans With Disabilities Act (ADA). Pro Se Petitioner's questions presented for review and his Statement of the Case, however, relate to a work accident which occurred in October 1998 (Appendix A), some four years after his request for reasonable accommodation. There is nothing

in his federal suit relating to any injury he may have suffered in 1998 due to negligence. In fact, Petitioner could not have raised the issues from the 1998 injury in a suit which was filed over one year before the new injury occurred.

While certainly some leeway is to be granted to pro se filings, the Petition and the Questions Presented for Review must be based upon the facts, issues, and law presented to the Sixth Circuit and litigated in the District Court. The argument of negligence in a 1998 accident can in no way form a basis for the granting of a petition for writ of certiorari in a case which was filed in 1997 based upon alleged violations of the ADA, and failure to grant a reasonable accommodation in 1994.

2. The Sixth Circuit Court Properly Affirmed The District Court's Decision To Grant Summary Judgment To Defendants For Failure Of Plaintiff To Establish A Prima Facie Case Of Handicap Discrimination Under The Americans With Disabilities Act Or The Rehabilitation Act.

The Petitioner has not raised, nor is there any evidence to the contrary that the Sixth Circuit committed any errors in reviewing the District Court's decision in this case.

A. Standards Of Review.

The Sixth Circuit is required to review the grant of summary judgment de novo using the same test that is used by the District Court. *Gains v. Runyon,* 107 F.3d 1171,

1174 (6th Cir. 1997). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

B. Petitioner Has Failed To Establish A Prima Facie Case of Disability Discrimination Under The Americans With Disabilities Act By Failing To Establish That He Was A Qualified Individual With A Disability.

The Sixth Circuit as well as the District Court were correct in their analysis of Petitioner's claims under the ADA as well as § 504 of the Rehabilitation Act. Petitioner had failed to present a prima facie case of disability discrimination because he failed to show that he was disabled under the meaning of the acts. *Sullivan v. River Valley School District*, 197 F.3d 804 (6th Cir. 1999), *cert. denied*, 120 S.Ct. 2718 (2000).

Although the record below indicates that Petitioner did suffer from a physical impairment of his back and knees, Petitioner had failed to show that these impairments substantially limit a major life activity within the meaning of the ADA. In fact, Petitioner's own treating physician indicated that Petitioner could perform all of the essential functions of his job one-hundred percent of the time. Additionally, Petitioner's own request for a reasonable accommodation also indicated that he could perform all the essential functions of his job. Since Petitioner was unable to prove that he was disabled under the ADA, the District Court found and the Sixth Circuit

affirmed that he was unable to prove a prima facie case under the ADA.

In making the foregoing arguments related to the issue of whether the Sixth Circuit erred by affirming the District Court's grant of summary judgment, the Respondents do not waive the threshold issue that Petitioner's Questions Presented for Review and his Statement of the Case have absolutely no relation to the facts, issues, and law in the case from which he appeals.

CONCLUSION

Petitioner has raised issues dealing with an unrelated 1998 work accident rather than his 1994 ADA request for reasonable accommodation. The Sixth Circuit's affirmance of the District Court's grant of summary judgment for Respondent was legally correct and compelling reasons, under Rule 10 of the Rules of the Supreme Court of the United States, do not exist. For all of the foregoing reasons, Respondents respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

[LOGO] *City of Columbus*

ACCIDENT REPORT 9877.92

Injury Incident Number

NOTE This form must be completed and forwarded to the Division's Claim Department within 24 hours after all on-the-job injuries and/or occupational illnesses are reported (Note: lost time does not begin until the day following the injury). Be sure every part of form is completed and every question answered. Data entry fields are highlighted in gray and *must be completed.* Both ***EMPLOYEE and SUPERVISOR*** must sign the back of form.

EMPLOYEE SECTION – to be completed by Employee

Social Sec Number

Name John (First) H. (Initial) Ford III (Last)

Home Address 5056 Nelson Dr. (Street) South Bloomfield (City), 43103 (Zip)

Home Phone (740) 983-2326

Work Address Parson's Ave. (Street) Columbus (City) (Zip)

Work Phone (614) 645-3227

Birth Date 07-10-59 Sex M

Job Title Plant Maint. Mech.

Dept/Div Public Utilities/Water

10-29-98
Date of injury/illness
⇓

[✓] Full-Time
[ ] Part-Time

Time of Injury/Illness 2:00-2:15

[ ] AM [ ] Before Work
[✓] PM [ ] After Work

Date Reported to Supervisor 10-30-98

Recurrence?
[ ] NO
[✓] YES

If "Yes", Date of Original Injury 5-14-97 If "Yes", Worker's Comp Claim #97-389555 If you did not report the injury recorded above to your supervisor on the date of the injury, please explain why: It was bothering me right after it happened, but it really didn't hurt as bad as it did the next morning.

Location of accident or exposure (building, room, number, street number, etc.): On a manlift, down inside the bottom of manlift #2 basin [JHP III]

Describe how accident occured – **BE SPECIFIC** (climbing, using tools, lifting, crawling, etc.): I was inside manlift by myself pulling up on a 40 ft. stainless steel tension rod so I could fasten it to the bar under the launder troff. Greg & Virgil were on the basin floor trying to help hold it. We're understaffed.

Witnesses:

(A) Virgil Silvey
Name Address Phone

(B) Greg Goodwin
Name Address Phone

Where were you treated? (Check all that apply)

01 [ ] No Medical Treatment Required
03 [ ] Hospital Emergency Room
➨ Hospital Name _____
ER Phys Name _____

02 [ ] First Aid Only 04 [✓] Personal Physician
➨ Name Dr. Frank Dibenedetto
Address 421 S. Gedgenville Rd. Cols. Ch. 43228

Accident Information:

WEATHER CONDITIONS

[01] Enter Primary Code

01 [✓] Clear
02 [ ] Fog
03 [ ] Heavy Wind
04 [ ] Rain
05 [ ] Not Applicable

SURFACE CONDITIONS

[01] Enter Primary Code

01 [✓] Dry
02 [ ] Ice
03 [ ] Grease
04 [ ] Mud/Sand
05 [ ] Wet
06 [ ] Snow
07 [ ] Not Applicable

LIGHT CONDITIONS

[02] Enter Primary Code

01 [ ] Dark
02 [✓] Day
03 [ ] Dawn/Dusk
04 [ ] Inside
05 [ ] Not Applicable

[✓] NOTE: Enter primary code number in box, check all other code boxes (small boxes) that apply

TYPE OF ACCIDENT [17] Enter Primary Code

* * *

17 [✓] Overexertion, Strain, Hernia, Twist

INJURY/ILLNESS CODES [20] Enter Primary Code

* * *

20 [✓] Hernia

* * *

Abdominal Wall Hernia

ANATOMY CODES [02] Enter Primary Code

* * *

02 [✓] Abdomen

* * *

SUPERVISOR SECTION – to be completed by Supervisor

Will injury result in lost time (other than date of accident)?

01 [✓] YES 02 [ ] NO

Was employee working with regular supervisor and/or crew?

01 [✓] YES 02 [ ] NO 03 [ ] Not Applicable

Was appropriate personal protective equipment being worn?

01 [✓] YES 02 [ ] NO 03 [ ] Not Applicable

Approximately how many years has injured employee been working in the job classificaiton?

01 [ ] Less than 1 year
02 [ ] 1 to 5 years
03 [✓] More than 5 years

What would you recommend to help prevent this type of accident/injury in the future (e.g., additional training, changes in equipment or procedures, closer supervision, etc.) Each individual needs to know their own physical abilities and limitations. Each individual needs to report any and all problems to his/her supervisor ASAP. Each individual should take responsibility for making sure themselves work safely and others around them do the same.

AGENT CODE [50/49] Enter Primary Code

* * *

49 [✓] Inattention, Fellow Employee
50 [✓] Inattention

* * *

Primary ICD9 Injury Code

Injury Diagnosis

Approval Code
R – Division Approve Pending
L – Division Approved, Finance Approval Pending

/s/ John H. Ford — 11-2-98
Signature of Employee — Date Signed

/s/ Mark G. Severt — 11-3-98
Signature of Supervisor — Date Signed

Signature of Division or Department Head
/s/ John R. Doutt

Date Signed 11/9